Pacific & Orient Insurance Co Sdn Bhd v Cheng Chor Tong & Ors

HIGH COURT (KUANTAN) — CIVIL APPEAL NO 12–11 OF 1999
HELILIAH MOHD YUSOF J
22 MAY 2006

Evidence — Estoppel — Conduct, by — Characteristics of

Evidence — Estoppel — Representation, by — Characteristics of

Road Traffic — Insurance — Running down action — RIMV search extract — Whether such extract a certificate of insurance

Messrs Tan & Tan ('TT') were solicitors of the injured victims in a motor vehicle accident ('MVA'). TT sent a notice of commencement of proceedings to the appellant insurers (appellants) pursuant to s 96 of the Road Traffic Act 1987 ('RTA'). Messrs Taye & Co ('TC') later wrote to TT informing them that they ('TC') had been appointed by the appellants to act for the alleged insured. TC later wrote again to TT requesting for a copy of the RIMV certificate ('P1') on the vehicle allegedly under the appellants' coverage. A copy of P1 was then extended to TC. TC was later served with the summons and statement of claim in respect of an action filed in the sessions court arising out of the MVA. TC then entered appearance and defence on behalf of the insured. TC subsequently wrote to TT to say that the vehicle involved in the MVA and allegedly under the appellants' coverage was not insured by the appellant. TC also requested for a copy of the insurance cover note. However TT replied that it did not have a copy of the cover note and that the particulars of insurance cover were as per the RIMV certificate (P1). The sessions court later gave judgment on liability as against the insured — against which an appeal was lodged. TT eventually filed a recovery action against the appellants pursuant to s 96 of the RTA 1987. The recovery action was decided against the appellants and the appellants thus appealed to the High Court (the recovery appeal). The recovery appeal was pursued on the basis of estoppel by representation. TT asserted that the conduct of TC in continuing to defend the actions and the fact that TC did not indicate anything to refute the liability on the claim amounted, to an estoppel by representation. TT also relied upon estoppel by conduct pursuant to s 115 of the Evidence Act 1950.

Held, allowing the appeal with costs:

(1) Estoppel by representation operates where a representation of fact has been made. There is also a need for the representation to be acted upon.

The representation must be also clear and unequivocal. It is also possible to make a representation by conduct to long as it is sufficiently unequivocal. Representation by conduct under s 115 of the Evidence Act 1950 arises where a person by his declaration, act or omission intentionally causes or permits another person (i) to believe a thing to be force; (ii) to act upon such a belief. If this is established then neither the person nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person (see paras 14–15, 19).

(2) The respondents had not adduced evidence that the solicitors (TC) were acting as agents for the insurers other than as solicitors. It was submitted that in accepting P1 to be part of the bundle of document, the appellants were to be inferred to have displayed conduct which was tantamount to silence and thereby to have accepted the statement in P1.This was overstretching the purposes for which documents are agreed upon for the purposes of evidence. P1 had been accepted for the purposes of the first proceedings where the main issue was to establish liability for the accident (see para 23).

(3) P1 was not capable of reasonably being construed as a clear unequivocal representation. In the first place the respondents who were raising the estoppel were the very persons who had procured the statement from the RMIV (JPJ) (see para 24).

(4) TC's letter requesting for the cover note could not be described as unequivocal conduct to concede acceptance of the contents of P1. The reliance of P1 as a document was also related to the provisions of the RTA. P1 did not operate independently (see para 25).

(5) In the present case, the presumption under s 114(e) of the Evidence Act 1950 was not applicable since there was evidence adduced by the appellant to displace the presumption. Further, the evidence of SD 2 indicated that there was some irregularity in the details or particulars that was stated in P1. It could not therefore be said that the Court could take judicial notice that everything was done regularly and therefore the presumption under s 114(e) of the Evidence Act 1950 was capable of being displaced (see paras 26–27).

(6) The respondents were not able to invoke the provisions of s 115 of the Evidence Act 1950 in order to establish estoppel. It was not borne out in evidence that it was the appellants who had intentionally caused or permitted any person to believe that they were in fact the insurers. The circumstances surrounding the first proceedings and second proceedings did not disclose that the appellants were silent or inactive. The evidence also did not show that the appellants or the counsel were capable of being aware or made to be aware that P1 was erroneous. The evidence showed that there were continuous efforts to verify the contents of P1 (see paras 28, 30).

(7) The respondents had not on a balance of probabilities established that P1 could be the basis of the claim in view of the provisions of s 91(4) read with s 96(1) of the RTA. P1 was not a document within the definition of a certificate of insurance (see paras 38–39).

[Bahasa Malaysia summary

Tetuan Tan & Tan (TT) adalah peguam mangsa yang cedera dalam kemalangan kenderaan motor (KKM). TT telah menghantar satu notis memulakan prosiding kepada penginsurans perayu (perayu menurut s 96 Akta Jalan Raya 1987 ('AJR'). Tetuan Taye & Co (TC) kemudian telah menulis kepada TT memaklumkan bahawa mereka (TC) telah dilantik oleh perayu-perayu untuk bertindak bagi pihak yang diinsuranskan. TC kemudian menulis lagi kepada TT meminta sesalinan sijil RIMV (P1) ke atas kenderaan yang dikatakan itu di bawah perlindungan perayu-perayu. Sesalinan P1 kemudian diberikan kepada TC. TC kemudian telah menyampaikan saman dan penyataan tuntutan berkaitan satu tindakan yang telah difailkan di mahkamah sesyen yang timbul daripada KKM it. TC kemudian memasukkan kehadiran dan memberi pembelaan bagi pihak yang diinsuranskan. TC kemudiannya menulis kepada TT untuk mengatakan bahawa kenderaan yang terlibat dalam KKM itu dan yang dikatakan di bawah perlindungan perayu-perayu tidak diinsuranskan oleh perayu. TC juga meminta sesalinan notis perlindungan insurans itu. Namun TT menjawab bahawa ia tidak mempunyai salinan nota perlindungan itu dan bahawa butir-butir perlindungan insurans itu adalah sama seperti sijil RIMV (P1). Mahkamah sesyen kemudian telah memberikan penghakiman tentang liabiliti terhadap pengambil insurans – yang mana satu rayuan telah dibuat. TT kemudian telah memfailkan satu tindakan mendapatkan balik terhadap perayu menurut s 96 AJR. Tindakan mendapatkan balik itu telah diputuskan tidak menyebelahi perayu dan perayu kemudian telah merayu ke Mahkamah Tinggi (rayuan mendapatkan balik). Rayuan mendapatkan balik itu dimulakan berdasarkan estopel melalui representasi. TT menegaskan bahawa perlakuan TT yang terus mempertahankan tindakan tersebut dan hakikat bahawa TC tidak menunjukkan apa-apa untuk menyangkal liabiliti berdasarkan jumlah tuntutan, terhadap estopel melalui representasi. TT juga bergantung kepada estopel melalui perlakuan menurut s 115 Akta Keterangan 1950.

Diputuskan, membenarkan rayuan dengan kos:

(1) Estopel melalui representasi berfungsi di mana satu representasi fakta telah dibuat. Representasi ini juga perlu dilaksanakan. Representasi tersebut juga perlu jelas dan tidak taksa. Representasi boleh dilakukan melalui perbuatan di bawah s 115 Akta Keterangan 1950 yang timbul daripada seseorang melalui deklarasi/tindakan atau peninggalannya secara sengaja menyebabkan atau membenarkan seorang yang lain (i) untuk mempercayai sesuatu itu berkuatkuasa; (ii) untuk bertindak berdasarkan kepercayaan tersebut. Jika ini dapat dibuktikan maka seseorang itu dan juga representasinya tidak akan dibenarkan untuk menafikan kebenaran perkara itu dalam mana-mana guaman atau prosiding antaranya dan seseorang itu (lihat perenggan 14–15, 19).

(2) Responden-responden tidak mengemukakan keterangan yang peguamcara (TC) telah bertindak sebagai ejen-ejen penginsurans selain daripada peguamcaranya. Adalah dihujahkan bahawa dalam menerima P1 sebagai sebahagian daripada ikatan dokumen, perayu-perayu hendaklah dianggap telah

menunjukkan perlakuan yang sama seperti mendiamkan diri dan oleh itu telah menerima kenyataan dalam P1. Ini tidak terangkum dalam tujuan yang mana dokumen-dokumen itu dipersetujui bagi tujuan keterangan. P1 telah diterima bagi tujuan prosiding pertama di mana persoalan utama adalah untuk membuktikan liabiliti dalam kemalangan tersebut (lihat perenggan 23).

(3) P1 tidak berupaya secara munasabahnya dianggap sebagai satu representasi yang jelas dan tidak taksa. Bahkan responden-responden yang menimbulkan estopel adalah yang mengemukakan kenyataan daripada RMIV (JPJ) (lihat perenggan 24).

(4) Surat TC meminta nota perlindungan tidak boleh dianggap sebagai perlakuan yang tidak taksa untuk bersetuju menerima kandungan P1. Kebergantungan kepada P1 sebagai dokumen juga berkaitan dengan peruntukan AJR. P1 tidak berfungsi secara berasingan (lihat perenggan 25).

(5) Dalam kes semasa andaian di bawah s 114(e) Akta Keterangan 1950 tidak terpakai memandangkan terdapat keterangan yang dikemukakan oleh perayu untuk mengalihkan andaian tersebut. Tambahan pula, keterangan SD2 menunjukkan bahawa terdapat beberapa luar aturan dalam maklumat yang dinyatakan dal;am P1. Oleh itu tidaklah boleh dikatakan bahawa mahkamah boleh mengambil notis kehakiman yang semuanya dilakukan mengikut aturan dan andaian di bawah s 114(e) Akta Keterangan 1950 boleh dialihkan (lihat perenggan 26–27).

(6) Responden-responden tidak dapat menggunakan peruntukan s 115 Akta Keterangan 1950 bagi tujuan membuktikan estopel. Tidak dibuktikan dalam keterangan bahawa perayu-perayu telah dengan sengaja menyebabkan atau membenarkan sesiapa untuk mempercayai bahawa mereka pada hakikatnya adalah penginsurans. Keadaan dalam prosiding pertama dan prosiding kedua tidak menunjukkan bahawa perayu-perayu mendiamkan diri atau tidak aktif. Keterangan juga tidak menunjukkan bahawa perayu-perayu atau peguam itu mampu menyedari atau diberi kesedaran bahawa P1 adalah salah. Keterangan menunjukkan bahawa terdapat usaha-usaha berterusan untuk mengesahkan kandungan P1 (lihat perenggan 28, 30).

(7) Responden-responden tidak membuktikan atas imbangan kebarangkalian bahawa P1 merupakan asas tuntutan menurut peruntukan s 96(1) AJR. P1 bukan satu dokumen dalam maksud satu sijil insurans (lihat perenggan 38–39).]

Notes

For a case on running down action, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 209.

For cases on estoppel by conduct, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1245–1250.

For cases on estoppel by representation, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1273–1286.

Cases referred to

Bankruptcy Notice, The [1924] 2 Ch 76 (refd)
Capital Insurance Bhd v Kasim bin Mohd Ali (refd)
Carr v London & North Wesson Rly Co (1875) LR 10 CP 307 (refd)
Dixon v Kennaway & Co [1990] 1 Ch 833 (refd)
English Case of City Tailors Ltd, The v Evans [1921] 38 TLR 230 (refd)
Exchange Securities & Commodities Ltd, The (1988) Ch 46 (refd)
Hopgood v Brown [1955] 1 WCR 213 (refd)
Indian Endurance (No 2) Republic of India & Anor, The v India Steamship Co Ltd [1996] All ER 641 (refd)
John Edwards & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249 (refd)
KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627 (refd)
Loo Keck Leong v PP [1992] 2 MLJ 177 (refd)
Low v Bowverie (1891) 3 Ch 82 (refd)
Lowe v Lombank [1960] 1 WLR 196 (refd)
Periasamy a/l Periathamby v South East Asia Insurance Bhd (refd)
Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd [1956] 1 QB 529 (refd)
Soole v Royal Insurance Co Ltd [1971] 2 Lloyd's Rep 332 (refd)
Syarikat Datu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors [1990] 3 MLJ 468 (refd)
Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 707 (refd)
Winson, The [1980] Lloyd's Rep 213 (refd)

Legislation referred to

Evidence Act 1950 ss 5, 14, 65, 114(e), 115
Road Transport Act 1987 ss 91(4), 96(1)
Road Traffic Ordinance 1987 s 96(1)

Appeal from: Civil Suit No 53–125 of 1995 (Sessions Court, Kuantan)

Suresh G Sreedharan (Kenaga, Suresh & Co) for appellant.
Tan Jin Wah (Tan & Tan) for the respondent.

Heliliah Mohd Yusof J:

[1] This was an appeal from the decision of the sessions court dated 20 March 1999 whereby judgement was entered against Pacific and Orient Co Sdn Bhd (the appellant/defendant) as insurers. The case against the defendant rested primarily on the issue of estoppel.

[2] It is useful to mention the factual matrix as follows:

(i) On 30 July 1989, there was an accident involving the motor vehicle No JBT 1288 and another motor vehicle WAA 5300 as a result of which several persons were injured. The firm Messrs Tan & Tan acted for all the injured victims.

(ii) The plaintiffs solicitors sent a notice of commencement of proceedings to the insurance company of M/s Pacific Insurance Co Sdn Bhd pursuant to s 96(1) of the Road Traffic Ordinance 1987.

(iii) According to the record of appeal [or RA] the firm of Messrs Taye & Co wrote on 22 February 1902 a letter to Messrs Tan & Tan. In that letter, the former stated the firm had been appointed by Pacific and Orient Insurance Co Sdn Bhd as solicitor to the defendant. The letter stated, inter alia, 'Kami baru dilantik oleh Pacific & Orient Insurance Co Sdn Bhd sebagai Peguamcara Defendant dalam tuduhan tersebut.' The letter also stated that the firm had instruction to accept service and the plaintiff were told to forward all the relevant documents.

(iv) On 25 February 1992, Messrs Taye & Co wrote another letter to the plaintiff/respondent firm requesting for a copy of the RIMV Certificate on motor car number WAA 5300 in order enable the client Pacific & Orient Insurance Co Sdn Bhd (defendant/appellant) to confirm coverage. The brief letter stated:

> Further to our letter of 22–2–92 please let us have a copy of the RIMV certificate on motorcar No WAA 5300 to enable our client to confirm coverage.

[3] According to p 178 of RA, Messrs Tan & Tan had sent, inter alia, a copy of the Jabatan Pengangkutan Jalan starch report together with the covering letter dated 2 March 1992.

[4] On 16 March 1992, the appellant/defendant's solicitors were served with the summons and statement of claim. It is necessary to state that at that material time the civil suit that was being instituted was still against one Raja Ali bin Raja Ahmed and Haji Mohd Hasibullah bin Mahmood (the then defendants).

[5] On 19 March 1992, the counsel for the defendants then entered appearance for Sessions Court Cases No 53–25/92, 53–26/92. In all the covering letters in which counsel for the defendants had enclosed the notices of appearance and the defence, the letters were also copied to the Pacific & Orient Insurance Co Sdn Bhd (the present appellants).

[6] The next document that was highlighted was the letter on the 21 March 1992 where the solicitors of the defendants had informed the plaintiffs solicitors that the vehicle that was involved in the accident was not insured by Messrs Pacific & Orient Insurance. In that same letter, a request was also made for a copy of the alleged insurance cover note (p 190 RA). The plaintiffs solicitors then had replied (p 192 of the RA) that they did not have a copy of the client's cover note and that the *particulars of the insurance cover* 'are as per the JPJ certificate'.

[7] It was pertinent then to note that the plaintiffs solicitor had relied on the JPJ certificate P1 without an actual cover note being produced throughout the trial.

[8] On 12 October 1994, the sessions court judge (the first proceedings) gave a decision which determined, inter alia, the question of liability. On 21 October 1994, a notice of appeal against the decision was filed. On 1 June 1995, an action was filed against the present appellant pursuant to s 96 of the Road Transport Act 1987 ('RTA') for failure to pay the claims awarded under the sessions court judgment of 12 October 1994. The proceedings on this claim were heard before different sessions court judges. The decision was delivered on 20 Mac 1999 in favour of the plaintiff against the present appellant (the second proceedings).

[9] This appeal was heard in respect of the second proceedings.

[10] The RA disclosed that the object of the first proceedings was to establish the rights or liability of the plaintiffs and defendants then. As that time, it could not be said that the appellants were already liable under the insurance policy that was alleged. The crux of the respondent's claim against the appellants in the present: appeal was based on estoppel.

[11] What had been relied on was essentially P1 a document issued by the Jabatan Pengangkutan Jalan (or JPJ). In the first proceedings it would appear that as result of a request from the solicitors of the plaintiffs JPJ had issued P1. Apparently, the appearance had been entered by counsel for the then defendants and the action against them were defended in order to prevent a judgement in default from being entered.

[12] There were no documents available in the present appeal to indicate the terms and polices of the insurance that could have been issued by the insurance company. The court will therefore not respond to the question whether the same solicitors should appear for both the defendants in the first proceedings and the insurance company as insurers for the defendants in the second proceedings. Nevertheless, Taye & Co had acted on the instructions of the insurance company to defend the then defendants.

[13] In the second proceedings against the insurers, the respondents in the present appeal relied on the issue of estoppel by representation. It is pertinent to note that no mention was made whatsoever of the possibility of negligence. What was asserted essentially was that the particulars in P1 identified the appellants as the insurers for the defendants in the first proceedings. Implicit in the arguments of plaintiff/respondents in the present appeal was that the conduct of the solicitors for the defendants in continuing to defend the actions and the allegations that the solicitors did not indicate anything to refute the liability on the claim amounted to an estoppel by representation. It is necessary however to bear in mind that there were actually two proceedings and it is necessary to determine whether throughout the advent of the two proceedings the appellants had made statements and conducted themselves such as to represent that they were the insurers who would be liable on the claim as insurers. The relevant provisions of the RTA are also not to be overlooked as those are statutory provisions which also have a bearing on the issue of a claim made by third parties against insurers. There were certain documents which have been relied upon by both the parties. It would appear that the sessions court judge

who had made the decision in the second proceeding had accepted the arguments of the counsel for the plaintiff/respondents on the issue of estoppel by representation on the basis of written submission. The sessions court judge who made the decision was not the judge who presided over the trial itself. Essentially, the issue is whether estoppel by representation had been established.

[14] Estoppel by representation operates where a representation of fact has been made. There is also a need for the plaintiff to have acted on the representation. In this appeal, it was contended that the plaintiff/respondent had proceeded on the basis that the conduct of the appellant's solicitors then Taye & Co had led them to believe that the appellants were the insurers.

[15] There are elements of representation which have to be considered. The line of judicial authority support the view that the representation must be clear and unequivocal: *Low v Bowverie* (1891) 3 Ch 82, CA at p 113 *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, CA per Denning KJ at p 540, *Lowe v Lombank* [1960] 1 WLR 196, CA per Lord Diplock at p 205.

[16] It is possible to make a representation by conduct to long as it is sufficiently unequivocal *Carr v London & North Wesson Rly Co* (1875) LR 10 CP 307, p 317. *Dixon v Kennaway & Co* [1990] 1 Ch 833 per Forwell J at p 838. *Hopgood v Brown* [1955] 1 WCR 213 per Evershed MR at p 224.

[17] Counsel for the respondents had also referred to s 115 of the Evidence Act 1950 which provides.

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.
>
> *ILLUSTRATION*
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> A, intentionally and falsely leads B, to believe that certain land belongs to A, and thereby induces B, to buy and pay for it.
>
> The land afterwards becomes the property of A, and A, seeks to set aside the sale on the ground that at the time of the sate he had no title.
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> He may not be allowed to prove his want of title.

[18] The line of authorities in Malaysia also indicate that the doctrine of estoppel has been applied per Choor Singh J in *Industrial & Commercial Realty Co Ltd v Merchant Credit Pte Ltd* [1980] 1 MLJ 208 , p 209 at p 223 per Peh Swee Chin in *Syarikat Datu Sinar Sdn Bhd & Ors v UMBC Finance Bhd & Ors* [1990] 3 MLJ 468 per Gopal Sri Ram, *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 707.

[19] By referring to s 115, the respondents in the present appeal were relying on estoppel by conduct where the following elements could be considered that is a

person by his declaration, act or omission intentionally caused or permitted another person: (i) to believe a thing to be force; (ii) to act upon such a belief. If this is established then neither the person nor his representative shall be allowed to deny the truth of that thing in any suit or proceeding between himself and such person.

[20] The respondents had also contended that after acknowledging documents (including P1) to be incorporated as part of the bundle of documents for purposes of the first proceedings, the appellants were to be inferred to have displayed conduct which were tantamount to silence or a form of acquiescence and were therefore estopped from denying the truth of the particulars in P1 which identified them as insurers.

[21] In this context, I find it useful to refer to certain specific passages from the judgement of Raja Azlan Shah FJ (as His Highness then was) in *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58, pp 60–61:

> The doctrine of estoppel is enacted in section 115 of the Evidence Act, 1950, which is *in pari materia* with section 115 of the Indian Evidence Act. Of the latter it is conceded that the law it enacts is the same as English law. see *Sarat Chunder Dey v Gopl Chunder Laha (3)*. It seems to me that what was there said in relation to the Indian Evidence Act must apply a *fortiori* to our Evidence Ad. Our Evidence Act which gets its inspiration from the Indian Evidence Acts does not therefore enact as law anything different from the law in England on the subject of estoppel, and English decisions on the subject are relevant to the determination of questions arising for decision under the Act.
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> …
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> …
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> On the case law, I need only refer to the speech of Lord Wright in the Privy Council case of *Mercantile Bank of India, Ltd v Central Bank of India, Ltd(4)* where after recalling Blackburn J's dictum in *Swan v. North British Australasian Co (5)* that 'it must be the neglect of some duty that is owing to the person led into the belief concluded that estoppel by negligence must always depend upon the existence of a legal duty owed by him who is sought to be estoppel to the person raising the plea.
>
> Therefore, mere silence cannot operate as an estoppel unless it is established that there is a duty to speak or act. Then deliberate silence or inaction becomes equivalent to a representation as much as if a representation has been made by express language or positive acts. I propose to refer only to *Greenwood v Martins Bank Ltd (6)* as it affords a good example of a whole line of cases on the subject. In that case, the husband owed a duty to the bank to disclose his wife's forgeries when he became aware of them so that the bank could take steps to sue the forger, but through his silence or failure to disclose the bank was prevented from taking action against the forger. In an action by the husband against the bank to recover the sums of money paid out by the latter on account of his wife's forgeries, the husband, because of his silence or failure to disclose the forgeries which he was under a legal duty to do, was held estopped from asserting the cheques were forgeries. Sautton LJ in the Court of Appeal (7) states the principle with great precision:
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> The classic exposition of the principle of estoppel is that given by Parke B, in delivering the judgement of the Court in *Freeman v Cooke (8).* He cites the rule in *Piokard v* Sears (9): 'That, where one, by his words or conduct, willfully causes another to believe in the existence off certain state of things, and induces him to act on that belief, or to alter his own

previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' And continues, 'The principle is stated more broadly by Lord Denman, in the case of *Gregg v Wells.* (10) where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.'

Lord Tomlin in the House of Lord [1933] AC on p 58 said:

> The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced -namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel.

In my view, the so-called cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as the representation, and it is a breach of that duty which is relied upon as creating an estoppel. But where there is an express representation made by or on behalf of the representor, negligence as a necessary element in estoppel is not relevant. The judgment of Browne LJ in *Moorgate Mercantile Co Ltd v Twitchings* (11) contains a valuable exposition of certain features of the law. He said (p 326):

> In my view, negligence is not a necessary element in estoppel where there has been an express representation made by or on behalf of the representor. Negligence, and therefore duty, are relevant where a party is alleging that silence or inaction amount to a representation, because in such cases he must establish a duty to speak or act: nee Spencer Bower, and eg *Greenwood v Martins Bank Ltd*.

[22] The element of a clear, unambiguous and unequivocal representation is the first issue to be considered. Reliance had been emplaced expressly on document P1. Before the first proceeding on the question of liability took place Taye & Co through the letter P4 (p 719 of the RA) had manifestly indicated they had been appointed as solicitors for the purposes of defending the claim against the then defendants who were involved in the accident.

[23] The question here is whether the appellants or their solicitors had made statements or displayed conduct that they agreed with the particulars in P1. The respondents had not adduced evidence that the solicitors were acting as agents for the insurers other than as solicitors. It was submitted that in accepting P1 to be part of the bundle of documents the appellants were to be inferred to have displayed conduct which were tantamount to silence and thereby to have accepted the statement in PL. This is overstretching the purposes for which documents are agreed upon for the purposes of evidence. P1 had been accepted for the purposes of the first proceedings where the main issue was to establish liability for the accident.

[24] The question was whether the silence that was alleged of Taye & Co had lulled the appellants solicitors into a sense of security and into believing that the appellants were indeed the insurers. This statement in P1 in my view was not capable of

reasonably being construed as a clear unequivocal representation, In the first place, the respondents who were raising the estoppel were the very persons who had procured the statement from the JPJ.

[25] Moreover, the chain of letters that had been referred to above indicated that the solicitors for the defendants in the first proceedings had requested for a cover note. This therefore could not be described as unequivocal conduct to concede acceptance of contents of PL The reliance of P1 as a document was also related to the provisions of the RTA. In other words, the statement from the JPJ does not operate independently of itself without reference to the specific provisions in the RTA. The decision of the Court of Appeal in *Capital Insurance Bhd v Kasim bin Mohd Ali*; [1996] 2 MLJ 425 is still directly relevant. In that case, a letter from JPJ which had stated that an insurance policy had been issued was still not accepted as fulfilling the requirements of s 96(1) or the RTA.

[26] The respondents contended that P1 had complied with the requirement of s 96(1) of the RTA. Pursuant to the allegation here was that P1 had been delivered to the appellants and that it was in conformity with s 96(1) of the RTA. Reference has been made to s 114(e) of the Evidence Act 1950 biased on the decision in *Periasamy a/l Periathamby v South East Asia Insurance Bhd* [1995] 2 AMR 1536. However, in the present cas, the presumption is not applicable since there was evidence adduced by the appellants to displace the presumption. In *Loo Keck Leong v Public Prosecutor* [1992] 2 MLJ 177, at p 182, Pek Swee Chin SCJ (as he was then) stated:

> This presumption is of course a rebuttable and optional presumption, based upon the common experience of mankind. It is applicable having regard to the facts and circumstances Of each case, and especially the absence of objection from the party to whom such presumption could be detrimental.

[27] The evidence of SD2 indicated that there was some irregularity in the details or particulars that was stated in P1. SD2 had indicated that the relevant files at the material time that the accident occurred was not situate in Kuantan. It cannot therefore be said that the court could take judicial notice that everything was done regularly and therefore the presumption under s 114(e) was capable of being displaced. The respondents in the present appeal contended that the appellants by their conduct had not indicated their disagreement with the contents of P1. Reference could be made to the decision in *The Indian Endurance (No 2) Republic of India & Anor v India Steamship Co Ltd* [1996] All ER 641, at p 653 per Staughton LJ.

> As to estoppel by acquiescence, the parties are agreed that the test is to be found in the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1976] 2 All ER 641 at pp 645–646, [1977] AC 890 at p 903:
>
> > In order that silence or inaction may acquire a positive content it is usually said that there must be a duty to speak or to act in a particular way, owed to the person prejudiced … What I think we are looking for here is an answer to the question whether, having regard to the situation in which the relevant transaction occurred, as known to both parties,

> a reasonable man, in the position of the 'acquirer' of the property, would expect the 'owner' acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known …

See also *Pacol Ltd v Trade Lines Ltd, The Henrik Sif* [1982] 1 Llyod's Rep 456 and *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281 at p 290, where Clarke J said:

> I agree … that the Court should indeed be careful before acceding to arguments which assert duties of disclosure in new situations. I also accept the points he makes that Clyde & Co are experienced solicitors and that there can be no general duty upon one party to litigation or potential litigation to point out the mistakes of another party or the legal advisers. However each situation must be judged in the light of its particular circumstances.

As Mr Rokison put it, a party to litigation is not obliged to be the nursemaid of his opponent, at any rate if the opponent is not an untutored individual but as well acquainted with commercial litigation as the government of India. The law does sometimes impose a burden on solicitors and counsel to help their opponent's case; but the burden should only be imposed when it is truly necessary, as otherwise, to quote Griffiths LJ in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1982] 3 All ER 394 at p 404; [1983] 1 AC 854 at 879, the client will be tempted to ask: 'Whose side are you on?'

[28] In the circumstances of this case, it is therefore found that the respondents are unable to invoke the provisions of s 115 of the Evidence Act 1950 in order to establish estoppel. It was not borne out in evidence that it was the appellants who had intentionally caused or permitted any person to believe that they were in fact the insurers. The belief that was held by the respondents that stemmed from P1. The respondents also relied on the action taken to defend the first proceedings as conduct which amounted to a representation that the appellants were indeed the insurers as stated in P1.

[29] In the case of *Soole v Royal Insurance Co Ltd* [1971] 2 Lloyd's Rep 332, a similar issue such as this arose. The question was whether in defending the question or determination of liability it therefore follows that the insurer was representing that there might be a claim under the policy which it might meet. Mr Justice Shaw held that there was no unequivocal representation by the insurer that the claim which was the subject matter of the proceedings as one which *must* give rise to a liability to indemnify the insured but only a representation that the claim *may* give rise to such liability. It could not therefore be said here that was as unequivocal representation since the fact of who constituted the insurance company emanated from a certificate. The conduct of solicitors then in defending the then defendants could be described as colourless since it could indeed subject them to a judgement being entered in default of appearance.

[30] The case of *The Winson* [1980] Lloyd's Rep 213, CA at p 223 decided that a statement that the alleged promisor had been advised by its solicitors to believe that it was liable does not amount to a promise that it was liable. However, no such situation was found here. The circumstances surrounding the first proceedings and second proceedings did not disclose that the appellants were silent or inactive.

The evidence also did not show that the appellants or the counsel were capable of being aware or made to be aware that P1 was erroneous. The evidence showed that there were continuous efforts to verify the contents of P1.

[31] The appellants had also relied on certain documents in respect of which admissibility was opposed. It had not been (disputed that defendants involved in the accident that is the alleged insured did not make themselves available. If indeed as submitted by the counsel for the respondents it was simple and easy to obtain the documents then the difficulty of obtaining the particulars of the assured was also attributed to the absence of the cover note which was the actual requirement of the law. However, the unfortunate part of the second proceedings was that there were also two changes in the presiding sessions court judge and consequential upon which inconsistent ruling were also made in respect of the issue of the admissibility of documents.

[32] The evidence of SD 3 the JPJ Officer comprised direct evidence on certain files related to the question of the insurance policy having been sent to the JPJ headquarters and he had conceded that there had been made a mistake.

[33] During the second proceedings even if there was reliance on a presumption the plaintiffs still had to prove on a balance of probabilities that the appellants were indeed the insurers including the required compliance with the law. With the absence of the actual cover note, it was therefore clear that the crux of the plaintiffs case remained throughout on P1.

[34] The admissibility of D21, D22 which indicated evidence that the appellants were not the insurers during the period of the accident had been strongly opposed. Section 65 of the Evidence Act 1950 specifies that documents must be proved by primary evidence. Primary evidence means the document itself had to be produced for the inspection of the court.

[35] The appellants had also introduced certain documents P24, P25, P26 the admissibility of which had been opposed by the respondents. The appellants relied on s 65 of the Evidence Act 1950 which enumerates instances when secondary evidence may be given of the existence, condition or contents of document admissible in evidence. The paragraph to be considered is paragraph (c). In *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 per Mohamed Dzaiddin SCJ (as he then was) stated (at p 633):

> Thus, basically, secondary evidence of the contents of a document is inadmissible, until the non-production of the original is first accounted for, so as to bring it within one or other of the cases provided for in the section.

[36] In the case before me in the second proceedings, SP2 had given evidence that even until the trial the appellants had not been able to confirm that they were the insurers. At p 94 of RA, SP2 gave evidence that Taye & Co had not been able to confirm the cover note. The RA indicated that the sessions court judge who presided

at the trial had been satisfied that the documents pertaining to the insurance were lost as apposed to then belief of SP2 who had expressed an opinion. A

[37] The first defence witness had given to my mind a reasonable explanation for the inability to obtain an original copy of a cover note or the insurance documents. Moreover if there was indeed a copy of the original cover note it should have been furnished by the then defendants who had apparently made themselves scarce. SD2 had indicated that the JPJ had made a mistake. Since it was the plaintiffs who first had to establish their case, the appellants had therefore brought forth a reasonable explanation which included through the evidence of SD3 of the need for the appointment of adjusters. The conduct of the appellants in seeking verification on the alleged policy was also explained through the evidence of SD4. Sections 5 and 14 of the Evidence Act 1950 could also be invoked to consider the relevance of P24, P25, P26. These documents were to be considered not necessarily for the purpose of establishing the truth of the contents but also for the purposes of explaining the fact that appellants had undertaken steps to verify the existence of a cover note or insurance policy in relation to the alleged contents of P1. B C D

[38] The respondents had not on a balance of probabilities established that P1 could be the basis of the claim in view of the provisions of s 91(4) read with s 96(1) of the RTA which respectively as follows: E

> 91. Requirements in respect of policies
>
> (4) A policy shall be of no effect for the purposes of this Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred *to as a 'certificate of insurance')* in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances. F
>
> 96. Duty of insurers to satisfy judgements against person Insured in respect of third party risks.
>
> *(1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such* liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement a sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating in interest on judgements. G H

[39] While the definition of a certificate of insurance includes a cover note, P1 was not such a document. No estoppel by representation will be allowed to be raised if the effect is to negate the operation of a statute: *The Bankruptcy Notice* [1924] 2 Ch 76 at pp 97–98 per Artkin LJ. *The Exchange Securities & Commodities Ltd* (1988) Ch 46, pp 57–60 per Harman J. To accept P1 as a statement to verify the truth of the particulars would operate against the requirements of the RTA which actually regular strict proof on the question of the claim against the insurers. I

[40] Some reference has been made to the issue of subrogation. In view of my conclusion that estoppel was not established on a balance of probabilities, it becomes unnecessary to dwell further on this issue. However for the sake of completeness that matter could be alluded as follows, that is, to state that reference to it was misplaced and may have contributed to a misdirection on that part of the decision of the sessions court judge. *The English Case of City Tailors Ltd v Evans* [1921] 38 TLR 230 could be referred to. Scrutton LJ in referring to an insurer's right of subrogation had said 'when he has paid, and not till then, he is subrogated to any legal rights the assured had which might reduce the loss, but not to any charitable contributions or sources of profit not depending on legal rights'. FR Hardy Ivamy in his treatise on Principles of Insurance Law had referred to the abovementioned case as well as the case of *John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249 at 245 per Me Cardie J: 'In my view, the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract if indemnity. As stated by Ivamy (above) the right of subrogation does not arise unless and until the insurers have admitted the assured's claim and have paid the sum payable under the policy.'

[41] The counsel for the respondents had also tad arguments on the question of detriment resulting from the reliance on the details in P1. However it was not the appellants that had deliberately contributed to the particulars in P1 and no evidence was shown that the appellants could have known of the mistake during the first proceedings and was taking undue advantage. The court does not find evidence to show that the appellants did not protest or dispute the contents of P1. In other words there was here a unilateral mistake which was acted upon by the respondents and not the appellants.

[42] In my view, the respondents could not have relied on the issue of estoppel by representation to establish the claim against the appellants. The appeal was therefore allowed with costs.

Appeal allowed with costs.

Reported by John Paul Simon